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No. 481.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

MARIE TORRE,

Petitioner,

v.

JUDY GARLAND,

Respondent.

PETITIONER'S REPLY BRIEF.

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November 24, 1958.

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Petitioner respectfully submits this reply brief to note certain omissions and correct certain errors contained in respondent's brief in opposition.

I.

Respondent's failure even to attempt to sustain the burden of showing good cause for discovery.

Perhaps the most significant feature of respondent's brief is its careful omission of any reference to Point V of the petition: the fact that disclosure was here ordered in the absence of—and without even requiring—a showing of good cause therefor.

It is submitted that the criteria applied by this Court in *Hickman* v. *Taylor* are equally applicable here and that forced disclosure of confidential news sources should not

be ordered where the litigant has demonstrably failed to bear the "burden [resting] on the one who would invade that privacy to establish adequate reasons to justify production. . . ." *Hickman* v. *Taylor*, 329 U. S. 495, 512 (1947).

II.

Grant or withholding of constitutional freedoms cannot be made to turn on this respondent's evaluation of the significance of the news involved.

Respondent readily satisfies herself that "freedom of the press" is not here involved and that, indeed, petitioner is not a "reporter" because, in respondent's view, the news here involved was not sufficiently weighty. Respondent's Brief, pp. 2-3.

As this Court has recognized on innumerable occasions, the sweeping constitutional freedoms of speech and press would be futile indeed if their ambit was restricted to speech unexceptionable in form and content.*

Respondent also urges that petitioner, like a "linotypist or an engineer", is beyond the reach of First Amendment protection. *Id.*, p. 3. As respondent must surely realize, petitioner has never contended for newspaper employees as such—the obvious test is whether the person involved is, like petitioner, part of the news-gathering process and

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* See, *e.g.*, *Winters* v. *New York*, 333 U. S. 507, 510 (1948):

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. * * * What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

whether constraint on a communication to that person would reduce the flow of news to the public.

Perhaps the short answer to respondent's contention is that, overwhelmingly, the press of this nation has expressed its concern with the decision below and has recognized editorially that the action of this Court in this case will establish a precedent hitherto lacking, a precedent whose impact will be immediate and will reach far beyond the facts of this particular case.*

III.

The Court below recognized and the record clearly establishes the confidentiality of the communication to petitioner.

Throughout her brief, respondent repeatedly assures this Court that there is really no question before it of violation of a confidential relationship, since petitioner's source "'. . . concededly, did not make the statements to her in confidence (32)'". Respondent's Brief, p. 3; see also *id.*, pp. 7, 9.

The record reference supposedly supporting the statement is then set out in the following abbreviated form:

> "*She was then asked 'Q. Did this network executive ask you to withhold giving his name?' And she answered 'A. No, he did not . . .'* (32)." *Id.*, p. 7 (italics in original).

The complete quotation in the record, however, reads as follows:

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* See, *e.g.*, Appendix C to Petition, listing some 70 publications which editorially urged that this Court review and reverse the decision below. Since the printing of the petition, an additional 40 editorials to the same effect have appeared or have been brought to petitioner's attention.

"Q. Did this network executive ask you to withhold giving his name? A. No, he did not. *It is just that having worked in the business so long in cases like this you don't mention the man's name.*" Joint Appendix, p. 32 (emphasis supplied).

When respondent's counsel continued to press for disclosure of the news source, petitioner further testified: "*You are asking me to violate a confidence.*" *Id.*, p. 33 (emphasis supplied).

It would seem that respondent cannot seriously dispute that the communication here involved was (in the words of Wigmore) "in the implied confidence of a confidential relation."

IV.

Respondent may well be able to obtain from other sources the information sought.

Respondent cites Professor Chafee's statement that a reporter's claim of confidence should be respected "except in cases of great necessity where he clearly possesses knowledge which is otherwise unobtainable" (Respondent's Brief, p. 9), but, respondent argues, "indisputably respondent was not able to obtain the name of the [CBS] executive from [CBS] officials." *Id.*, p. 7.

Respondent rests this conclusion on certain answers given by CBS to interrogatories served by respondent. *Id.*, pp. 6-7.

Respondent has given, however, somewhat less than the whole story. Respondent has not always viewed these answers as foreclosing further inquiry.

Upon receipt of CBS' answers, respondent moved to compel further answers, stating that the answers served

were "inadequate and insufficient as a matter of law and are, in effect, no answers at all." Affidavit of respondent's counsel, December 9, 1957.*

CBS opposed respondent's motion in an affidavit, December 18, 1957, which disclosed that CBS had circularized its employees and that two named employees had conceded that they might have made the statements here involved to petitioner.

Respondent's motion was then granted, with the provision that "If parties cannot agree upon the extent of the further efforts to be made by the defendant [CBS], the issue may be tested by a similar motion, if necessary, upon the submission of the further answers."

To date, respondent has made no further effort to reach such agreement with CBS, has made no further motion as suggested by the motion judge, and has not even sought to take the deposition of one of the two CBS employees specifically identified by name by CBS.

Respondent seeks to gloss over her failure to explore alternate sources of securing the information she purportedly desires by complaining that she was not obliged "as suggested in the petition (21) to go to the absurd length and expense of taking the deposition of every employee of the entire Columbia Broadcasting System". Respondent's Brief, p. 7.

As the page reference in the petition discloses, petitioner, of course, never took any such position. Petitioner did state that it was incumbent upon respondent to at least complete the depositions of the two persons named as possible sources by CBS prior to seeking to have a reporter imprisoned for preserving a professional confidence.

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* These proceedings occurred after petitioner's original citation for contempt and are on file in the records of the United States District Court for the Southern District of New York, which this Court may, of course, judicially notice. The proceedings were also called to the attention of the Court of Appeals.

V.

Respondent's purported distinction of the English authorities is specious.

Respondent blandly dismisses the English precedents, see Petition, pp. 15-17, on the ground that newspapers there were the defendants and "the name of the person who informed the newspaper was, in any event, immaterial". Respondent's Brief, p. 8.

This statement is wholly at variance with the cases. Indeed the striking feature of these cases is that they preserve the confidence of news sources even where the defendant had pleaded fair comment, thus bringing the identity of the source squarely into issue.

The significant factor is not, of course, whether or not a newspaper was the defendant, but that the libel action was grounded on matter appearing in a newspaper, thereby affording the aggrieved person a remedy in a libel action against the newspaper. The newspaper then was confronted with the alternatives of disclosing the source or accepting the risks of defending without establishing the authenticity and good faith of the news source, with all the adverse inferences that could be drawn therefrom.

That in the present case respondent's evaluation of her libel action was such that she has elected not to institute suit against the newspaper can hardly improve her position.

VI.

Respondent's attempted distinction between disclosure of source and disclosure of name is without substance.

Respondent contends that petitioner's reference to her source as a "network executive" constitutes a "disclosure" of petitioner's source. Respondent's Brief, pp. 2, 10-11.

This argument was urged upon both courts below by respondent at great length and was, properly, totally ignored by both courts.

Petitioner, of course, has not in fact disclosed her source; if she had, respondent would never have brought this proceeding.

Moreover, as a cursory scanning of any newspaper demonstrates, important news is frequently communicated to the public accompanied by a general reference to the news source; indeed, in some instances, such general reference may be the very factor which makes the news story significant. To contend that protection of the source should be withdrawn under such circumstances would deprive such protection of all substance and render it wholly unworkable in practical application.

Conclusion.

Over and beyond the specific errors of respondent's brief, there is one crucial defect which pervades the whole: respondent's attempt to brand the relief here sought as an attempt by the press to arrogate to itself some special privilege.

If it were the press alone that would suffer from the effects of the decision below, then this case might have less claim on this Court's attention.

But there is more at stake here. The number is legion of news articles—articles affecting our national security and the operation of our Government—which were disclosed to the press by confidential news sources, and which never would have been so disclosed had the source believed that disclosure of his identity could thereafter have been compelled. In many instances, the public interest has been greatly served thereby.

If this Court should not grant review, these sources, at the very least, will be less ready to expose themselves to the dangers of retaliation, and news will be lost to the public.

At issue here is not a request for solicitude for a particular profession. It is the freeing of the gathering of news from a real and practical restraint that must here be determined.

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari herein prayed for should be granted.

Respectfully submitted,

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November 24, 1958.